

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Christopher Shane Phillips, # 277082,
aka Christopher S. Phillips,

Plaintiff,

VS.

South Carolina Department of Corrections;
Andrea Thompson, *Headquarters State Classification*;
Yvonne Lofton, *Program Assistance*;
Warden Bernard McKie;
Director Jon E. Ozmint,
Dennis Patterson, *Records and Classification*,

Defendants.

) C/A No. 8:10-1331-HFF-BHH

Report and Recommendation

Background of this Case

The plaintiff is an inmate at the Kirkland Correctional Institution of the South Carolina Department of Corrections. He has brought suit, pursuant to 42 U.S.C. § 1983, against the South Carolina Department of Corrections, his Warden, and other SCDC officials. Although the above-captioned case is purportedly styled as a case involving protective-custody matters, the plaintiff is actually seeking a transfer to a prison outside of South Carolina because he fears for his life. The amended complaint and the original complaint indicate that the plaintiff's fears are based on the age of his victim during a sex crime. Articles available on the LEXIS® service indicate that the plaintiff, then a registered sex offender and high on crack cocaine, in 2005 raped a 76-year-old female in York

County. See, e.g., Andrew Dys, *Rapist of widow gets 40 years; Attack something 'everyone dreads in their own home'*, The Herald (Rock Hill, S.C.), March 21, 2006.

Discussion

Under established local procedure in this judicial district, a careful review¹ has been made of the *pro se* amended complaint pursuant to the procedural provisions of 28 U.S.C. § 1915, 28 U.S.C. § 1915A, and the Prison Litigation Reform Act. The review has been conducted in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951 (4th Cir. 1995)(*en banc*); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Boyce v. Alizaduh*, 595 F.2d 948 (4th Cir. 1979) (recognizing the district court's authority to conduct an initial screening of any *pro se* filing);² *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978); and *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). The plaintiff is a *pro se* litigant, and thus his pleadings are accorded liberal construction. See *Erickson v. Pardus*, 551 U.S. 89 (2007)(*per curiam*); *Hughes v. Rowe*, 449 U.S. 5, 9-10 & n. 7 (1980)(*per curiam*); and *Cruz v. Beto*, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint or petition, the plaintiff's

¹Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (DSC), the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the District Court.

²*Boyce* has been held by some authorities to have been abrogated in part, on other grounds, by *Neitzke v. Williams*, 490 U.S. 319 (1989) (insofar as *Neitzke* establishes that a complaint that fails to state a claim, under Federal Rule of Civil Procedure 12(b)(6), does not by definition merit *sua sponte* dismissal under 28 U.S.C. § 1915(e)(2)(B)(i) [formerly 28 U.S.C. § 1915(d)], as “frivolous”).

or petitioner's allegations are assumed to be true. *Fine v. City of New York*, 529 F.2d 70, 74 (2nd Cir. 1975). Even so, a plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is plausibly liable, not merely possibly liable. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), which is cited in *Silva v. Spencer*, No. 08-cv-1686-H (LSP), 2009 U.S. Dist. LEXIS 61467, 2009 WL 2160632 (S.D. Cal., July 17, 2009). Even under this less stringent standard, the § 1983 complaint is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990).

The plaintiff is not entitled to a transfer to a prison outside of the State of South Carolina. There is no constitutional right for a state prisoner or federal prisoner to be housed in a particular institution, at particular custody level, or in a particular portion or unit of a correctional institution. See *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Ange v. Paderick*, 521 F.2d 1066 (4th Cir. 1975); and *Lyons v. Clark*, 694 F. Supp. 184, 187 (E.D. Va. 1988) (collecting cases), *affirmed*, 887 F.2d 1080 (4th Cir. 1989)[Table]. In other words, the placement and assignment of inmates into particular institutions or units by state or federal corrections departments are discretionary functions, and are not subject to review *unless* state or federal law places limitations on official discretion. *Hayes v. Thompson*, 726 F.2d 1015, 1016-17 & n.1 (4th Cir. 1984) (collecting cases).

It is known from other cases previously decided in this judicial district that South Carolina law confers no protected liberty interest upon inmates of the South Carolina

Department of Corrections from being classified, or being placed in administrative segregation, in a particular prison, or in a particular section of a prison. See, e.g., the order of the Honorable Henry M. Herlong, Jr., United States District Judge, in *Keeler v. Pea*, 782 F. Supp. 42, 43-44 (D.S.C. 1992), which cites *Meachum v. Fano*, 427 U.S. 215 (1976). See also *Vice v. Harvey*, 458 F. Supp. 1031, 1034 (D.S.C. 1978). In fact, it is well settled that the placement of inmates into administrative segregation units or similar units is a valid means of minimizing a "threat to security of the institution, threat to the safety of other residents or Jail staff, etc." *Jackson v. Bostick*, 760 F. Supp. 524, 528 (D. Md. 1991). See also *McKune v. Lile*, 536 U.S. 24, 26 (2002) (noting that the "decision where to house inmates is at the core of prison administrators' expertise"); *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) ("The transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.");³ *Anderson v. County of Kern*, 45 F.3d 1310, 1312 (9th Cir. 1995) (prison officials have legitimate penological interest in administrative segregation, and they must be given "wide-ranging deference" with respect to their need to maintain order, discipline, and "institutional security"); and *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (if a prisoner's confinement is within terms of the sentence imposed upon him and does not violate other constitutional provisions, "the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight").

³Unrelated portions of the holding in *Hewitt v. Helms* have been superannuated by later case law. This portion of the holding in *Hewitt v. Helms* has not been superannuated by later case law.

Prison officials are required to protect inmates from violent attacks by other inmates. See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (prison officials have duty to protect prisoners from violence “at the hands of other prisoners”), which was an action brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See also *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (suffering physical assaults in prison is not “part of the penalty that criminal offenders pay for their offenses against society”); *Benefield v. McDowall*, 241 F.3d 1267, 1272 (10th Cir. 2001) (inmate does not have to wait until he or she is actually assaulted before obtaining relief: “In order to satisfy the objective component of an Eighth Amendment violation, an inmate must therefore show that he is incarcerated under conditions posing a *substantial risk of serious harm*.”), which cites *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (“A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.”);⁴ *Miltier v. Beorn*, 896 F.2d 848, 851-52 (4th Cir. 1990) (“A defendant acts recklessly by disregarding a substantial risk of danger

⁴At the time *Woodhous* was decided, inmate attacks were evaluated under a negligence standard. Although the negligence standard for § 1983 actions was superannuated by later case law, *Woodhous* is still good law on the issue of inmate attacks. See *Gilland v. Owens*, 718 F. Supp. 665 (W.D. Tenn. 1989):

Woodhous applies a negligence standard to the conduct of officials in protecting inmates from assault or the threat of assault. While this aspect of *Woodhous* no longer correctly represents the law in this circuit, see *McGhee v. Foltz*, 852 F.2d 876, 881 (6th Cir. 1988), its holding that an inmate has a right to be free from constant threat of violence is still an accurate statement of the law.

Gilland v. Owens, 718 F. Supp. at 686 n.13.

that is either known to the defendant or which would be apparent to a reasonable person in the defendant's position.”); *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000); *Williams v. Mueller*, 13 F.3d 1214, 1216 (8th Cir. 1994); and *Morales v. New York State Dep’t of Corrections*, 842 F.2d 27, 30 (2nd Cir. 1988).

Notwithstanding the aforementioned cases, the defendants are not required to transfer the plaintiff to a prison of his choice. *Kuehner v. Pennsylvania*, Civil Action No. 09-749, 2010 U.S. Dist. LEXIS 53513, 2010 WL 2245568,*6 (W.D. Pa., May 7, 2010) (“Similarly, the United States Supreme Court has made it clear that the due process clause provides constitutional safeguards prior to conviction, but, upon a valid conviction, it does not provide a federal liberty interest guaranteeing housing in a particular penal institution or providing protection against transfer from one institution to another within the state prison system.”). Since the plaintiff is not entitled to an intra-state prison transfer, he also is not entitled to an out-of-state transfer. See *Rider v. Werholtz*, 548 F. Supp. 2d 1188, 1199 (D. Kan. 2008) (“The court understands that plaintiff did not want to enter protective custody because of an event and conditions he had heard about there, but ‘prison officials are not required to guarantee a prisoner's safety under terms and conditions dictated by the prisoner. A prisoner is entitled to adequate protection from harm, but is not entitled to direct prison officials on the means to accomplish it.’”), where the prisoner sought, *inter alia*, an out-of-state prison transfer; and *Isgrigg v. CDC*, No. C 06-07618 JW (PR), 2008 WL 754892, *2 (N.D. Cal., March 20, 2008) (“A prisoner's liberty interests are sufficiently extinguished by his conviction that the state may generally confine or transfer him, or not

transfer him in the case of plaintiff, to any of its institutions, to prisons in another state or to federal prisons, without offending the Constitution”).⁵

Recommendation

Accordingly, it is recommended that the District Court dismiss the above-captioned case *without prejudice* and without issuance and service of process. See *Denton v. Hernandez*; *Neitzke v. Williams*; *Brown v. Briscoe*, 998 F.2d 201, 202-204 (4th Cir. 1993); 28 U.S.C. § 1915(e)(2)(B) [essentially a redesignation of "old" § 1915(d)]; and 28 U.S.C. § 1915A [as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal]. The plaintiff's attention is directed to the Notice on the next page.

s/Bruce Howe Hendricks
United States Magistrate Judge

June 17, 2010
Greenville, South Carolina

⁵No LEXIS citation is available for this decision.

Notice of Right to File Objections to Report and Recommendation

The plaintiff is advised that he may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

**Larry W. Propes, Clerk of Court
United States District Court
Post Office Box 10768
Greenville, South Carolina 29603**

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).